(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

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| In re: | ) | |
| BWX Technologies, Inc. | ) | RCRA (3008) Appeal No. 97-5 |
| Docket No. RCRA-III-162 | ) | |

[Decided April 5, 2000]

***DECISION AND REMAND ORDER***

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Scott C. Fulton.***

**BWX TECHNOLOGIES, INC.**

RCRA (3008) Appeal No. 97-5

# DECISION AND REMAND ORDER

Decided April 5, 2000

Syllabus

BWX Technologies, Inc. is charged with violations arising under the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §§ 6901 *et seq.*, and the Virginia Hazardous Waste Regulations ("VHWR"), 9 VAC 20-10-10. The alleged violations relate to the storage of hazardous waste during a three-year period, from November 19, 1980, to September 30, 1983, in a storage unit known as the Cold Pond, which was formerly part of BWX's nuclear-fuel-component manufacturing facility, located near Lynchburg, Virginia. BWX did not report the existence of the Cold Pond or otherwise seek a permit for it at any time. BWX subsequently closed this storage unit, emptying it of its contents. After a period of negotiations with the Complainant, Region III of the U.S. Environmental Protection Agency (the "Region"), and state regulatory officials in Virginia, BWX advised the two regulatory agencies that enriched uranium had inadvertently entered the Cold Pond when it had been in operation, thereby creating a mixed radioactive and hazardous waste and thus allegedly removing the resulting mixture from jurisdiction under RCRA and the VHWR. BWX moved for dismissal of the complaint; the Region countered with its own motion for accelerated decision.

The Presiding Officer granted EPA's motion and denied BWX's. BWX appealed to the Environmental Appeals Board. In its appeal, BWX asserts that there is "overwhelming evidence" of the Cold Pond's continuous contamination with enriched uranium during the three-year period. According to BWX, this evidence:

> (1) requires dismissal of the Region's complaint because the evidence rebuts the Region's argument that the Cold Pond was not continuously contaminated with enriched uranium, thus defeating the Region's prima facie case for RCRA liability; or alternatively

(2) raises a "genuine issue of material fact," barring an accelerated decision in the Region's favor and requiring an evidentiary hearing on the matter.

In addition, BWX contends that even if the Region prevails on its motion for an accelerated decision, the Region should nevertheless be equitably estopped from enforcing its complaint.

According to the Region, it is entitled to a ruling in its favor because, inter alia*:*

(1) it had established, and BWX conceded, that the pickling acid solution in the Cold Pond was a hazardous waste regulated by RCRA;

(2) BWX in defense could not show by a preponderance of the evidence that the Cold Pond was continuously contaminated with enriched uranium during the three-year period; and

(3) even if the Cold Pond contained mixed radioactive and hazardous wastes, the hazardous waste in the Pond was nevertheless subject to RCRA and VHWR jurisdiction during this time period.

As the Presiding Officer did in her decision, the Board accepted, for the sake of argument in ruling on the parties' motions, BWX's contention that if the Cold Pond were continuously contaminated with enriched uranium during the relevant period of operation, it would fall outside RCRA jurisdiction and instead be subject to the exclusive jurisdiction of the Nuclear Regulatory Commission.

HELD: The Presiding Officer's decision is affirmed in part, reversed in part, and remanded for further proceedings.

1) The denial of BWX's motion to dismiss is affirmed, since the motion is predicated on the erroneous legal theory that the Region had the burden of proving that the Cold Pond was not continuously contaminated with enriched uranium during the three-year period. In actuality, the contamination issue was raised by BWX as an affirmative defense; thus, it bore the burden of proving that the Cold Pond was continuously contaminated with enriched uranium during that time period.

2) The granting of EPA's motion for an accelerated decision is reversed. Due to the relative brevity of the decision, its summary handling of dispositive legal

conclusions, and its overall lack of articulated analysis, it is unclear, inter alia, whether the Presiding Officer adhered to fundamental summary judgment principles, whether circumstantial evidence was properly factored into the decision, and whether there is any reasoned basis for certain dispositive legal conclusions.

3) In response to BWX's contention that it should have an opportunity to argue at an evidentiary hearing that EPA is estopped from enforcing its complaint because the Region had earlier concurred in BWX's conclusion that the Cold Pond was not subject to regulation under RCRA, it is concluded that BWX, by failing to proffer specific facts showing affirmative misconduct by the Region, has failed to raise a "genuine issue of material fact" on its equitable estoppel claim against the Region, and is therefore not entitled to an evidentiary hearing on the matter.

4) Upon remand, the Presiding Officer may either (i) issue a new decision granting the Region's motion for an accelerated decision, in whole or in part (after curing the noted deficiencies), or (ii) in the event of a partial or complete denial of the motion, hold an evidentiary hearing to resolve alleged disputed issues. Any decision issued at the end of the proceedings on remand should include a detailed statement of findings and conclusions on all material issues as well as supporting discussion and analysis of those findings and conclusions.

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Scott C. Fulton.***

***Opinion of the Board by Judge McCallum:***

## **I.** *INTRODUCTION*

Respondent BWX Technologies, Inc. ("BWX")[1] appeals from an initial decision by Presiding Officer J. F. Greene ("Presiding Officer"), dated September 29, 1997, in which she denied BWX's motion to dismiss and granted Complainant U.S. Environmental Protection Agency Region

[1] Effective July 1, 1997, Respondent BWX acquired all of the assets and liabilities of the original respondent in the proceeding, Babcock & Wilcox Company, Naval Nuclear Fuel Division. Henceforth, we refer to both the current Respondent and its predecessor as "BWX."

III's (the "Region") motion for an accelerated decision. The Presiding Officer concluded that BWX, as charged in an administrative complaint filed by the Region, had violated certain provisions of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq*. ("RCRA"), and the Virginia Hazardous Waste Regulations, 9 VAC 20-10-10 *et seq*. ("VHWR"), both of which require owners and operators of hazardous waste treatment, storage, and disposal facilities to submit applications for permits once the facilities become subject to RCRA. According to the complaint, BWX was required to, but did not, file a permit application for a hazardous waste surface impoundment owned and operated by BWX, known as the "Cold Pond."

The alleged violations relate to the storage of waste materials in the Cold Pond, from November 19, 1980, to September 30, 1983. The Region alleges that the Cold Pond contained RCRA and VHWR-regulated waste during the above period, while BWX contends that the Cold Pond's waste also contained enriched uranium, "a special nuclear material," during the entire period, and as such constituted "mixed radioactive waste," thus bringing the impoundment within the exclusive jurisdiction of the Nuclear Regulatory Commission ("NRC"). In her initial decision, the Presiding Officer held that BWX had failed to raise a genuine issue of material fact on the Cold Pond's contamination, and that BWX was therefore liable under the relevant sections of RCRA and the VHWR.[2]

In seeking review and reversal of the initial decision, BWX contends that its motion to dismiss should have been granted because the Region failed to allege that the Cold Pond was not continuously contaminated with enriched uranium during the above time period and thereby failed to satisfy an essential element of its prima facie case for

[2]This proceeding only concerns the issue of BWX's liability under RCRA and VHWR, since the parties, on October 17, 1997, stipulated to the terms of a consent agreement obligating BWX to pay a $65,940 penalty and undertake numerous remedial measures in the event the company did not prevail in its appeal.

the company's RCRA liability. Alternatively, BWX contends that the Presiding Officer should not have granted the Region's motion for an accelerated decision because the company has raised a genuine issue of material fact on the Cold Pond's contamination, thereby entitling it to an evidentiary hearing on the matter.

Moreover, BWX states that even if it cannot show that the Cold Pond was continuously contaminated with enriched uranium, the Region should be equitably estopped from bringing its complaint.

For the reasons stated below, the initial decision is affirmed in part, reversed in part, and the case is remanded to the Presiding Officer for further proceedings.

## **II.** *BACKGROUND*

### **A.** *The Facility*

BWX owns and operates a facility at Mt. Athos, near Lynchburg, Virginia, where it manufactures nuclear fuel components for the U.S. Navy's nuclear-powered fleet. The facility, referred to as the Navy Nuclear Fuel Division ("NNFD"), uses uranium enriched in the U-235 isotope ("enriched uranium") and as such is regulated by NRC License No. SNM-42. Affidavit of [David W. Zeff] in Support of Respondent's Motion to Dismiss ("Zeff Aff.") ¶ 13. The facility consists of separate "hot" and "cold" units, the former designating operations that involve contact with enriched uranium and the latter designating those that are not intended for contact with enriched uranium.

As part of its "cold" manufacturing process, BWX "pickles" or cleans zirconium alloy parts with a solution of nitric and hydrofluoric acid, generating a "pickling acid solution" that requires neutralization in a treatment plant before discharge. From 1973 to 1983, BWX stored excess pickling acid solution, wastewater, and stormwater in the Cold Pond, which served as a temporary holding unit whenever the capacity of two metal tanks was exceeded. In September 1983, BWX suspended

use of the Cold Pond and emptied its contents into the two metal tanks, because the volume of wastewater had decreased to a level that could be adequately contained by the tanks. From that point onward, the company ceased using the Cold Pond. Appeal Brief at 3; Zeff Aff. ¶¶ 5-7.

The "recycle water system" is one of the chief contributors of wastewater in BWX's operations. While the James River accounts for the largest share of recycle water, a smaller share derives from rainwater that drains from the roofs of several of the facility's buildings. One of the NNFD units that supplies roof drainage to the recycle water system is the uranium recovery building.[3] This "hot" unit recovers enriched uranium from scrap generated in various manufacturing processes throughout the facility. A scrubber mounted on the roof of the uranium recovery building captures enriched uranium emitted by the operation to reduce it to levels approved by the NRC. BWX contends that rainwater on the roof became contaminated with enriched uranium, infiltrated the recycle water system, and eventually entered the Cold Pond, causing it to be contaminated as well and thereby creating a "mixed radioactive waste" not subject to EPA's or VHWR's enforcement jurisdiction.

**B.** *The Alleged Violation and Subsequent Proceedings*

On July 14, 1980, BWX, prompted by the newly adopted regulations implementing RCRA, submitted a Notification of Hazardous Waste Activity informing the Region that some of its activities were subject to regulation under the Act and its implementing regulations. In particular, BWX identified its pickling acid solution of nitric and hydrofluoric acid as corrosive, and therefore a characteristic hazardous

[3]On September 1, 1990, BWX disconnected the uranium roof drainage from the recycle water system after it identified the roof drainage as the most likely source of enriched uranium contamination of the recycle water system. Zeff Aff. ¶¶ 4, 9.

waste[4] under 40 C.F.R. § 261.22. On October 20, 1980, pursuant to 40 CFR § 265.1, BWX submitted its Part A application for interim status allowing it to continue operating an existing hazardous waste treatment, storage or disposal facility until it could obtain a permit.[5] However, BWX's Part A application never identified the Cold Pond. On February 7, 1986, during the course of an inspection of BWX's facility, the Virginia Bureau of Hazardous Waste Management ("Bureau") discovered the Cold Pond, which by that time had already been retired from service some two-and-a-half years earlier. Learning that the facility had been operated to store the highly acidic zirconium pickling acid solution after the effective date of the hazardous waste management regulations (November 19, 1980), and that this activity did not qualify for a regulatory exemption, the Bureau cited BWX for operating the facility without interim status or a permit.

On April 10, 1987, after giving prior notice to the State of Virginia pursuant to RCRA section 3008(a)(2), 42 U.S.C. § 6928(a)(2), the Region filed a 17-count complaint against BWX, alleging violations of

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[4]Under RCRA, solid wastes fall into the hazardous category and are thus subject to the Subtitle C regulatory program by either being individually listed as hazardous (i.e., listed hazardous wastes) or exhibiting a hazardous characteristic (i.e., characteristic hazardous wastes). *See* 40 C.F.R. Part 261. The four characteristics that determine hazardous status are ignitability, corrosivity, reactivity, and toxicity. *See* 40 C.F.R. §§ 261.3, 261.20.

[5]RCRA requires every owner and operator of a hazardous waste management facility to obtain a permit. An existing hazardous waste management facility (i.e., one that was in existence on November 19, 1980 or one that was in existence on the date of any statutory or regulatory change that makes the facility subject to RCRA) need only notify EPA of its hazardous waste management activity and file a Part A application to obtain interim status and continue operations. 40 C.F.R. §§ 270.10(e), 270.70(a). Part A is a short form containing certain basic information about the facility, such as the facility name, location, nature of business, regulated activities, and topographic map of the facility site. 40 C.F.R. § 270.13. If all additional requirements and conditions are met, an interim status hazardous waste management facility will be issued a site-specific permit in due course.

RCRA and the VHWR.[6] The Region's complaint alleged that BWX had violated regulations implementing RCRA found at 40 C.F.R. parts 260-270, as well as analogous regulations of Virginia's hazardous waste management program.[7,8] The complaint sought a $191,118 penalty and closure of the facility in accordance with RCRA regulations. In its answer, BWX admitted that it stored pickling acid waste in the Cold Pond and had not obtained interim status for the unit's operation. Answer ¶¶ 8, 10.

Negotiations between the Region, BWX, and the State of Virginia ensued. However, in June 1990, when the parties were about to sign a consent agreement and decree, BWX advised the Region and the State of Virginia that, as a result of a "comprehensive facility efficiency study" of the plant that it had conducted in 1989 and 1990, it had determined that the Cold Pond was contaminated with enriched uranium (U-235) from other parts of the plant during its entire period of operation from November 19, 1980 (when the unit allegedly first became subject to RCRA interim status requirements) to September 30, 1983

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[6]BWX asserts that the Region's complaint preempted negotiations between the company and the Bureau that had led to a "tentative agreement" between the two parties providing for the "closure of the Cold Pond without the assessment of a penalty." Appeal Brief at 5. The Region disputes BWX's account, stating that BWX has "nothing on paper" to prove such an agreement was ever reached between the two parties, and noting that the Region commenced the action with the State of Virginia's concurrence. Region's Reply at 15.

[7]On December 4, 1984, the State of Virginia received authorization from EPA to administer a hazardous waste management program in lieu of the federal program, pursuant to RCRA section 3006(b), 42 U.S.C. § 6926(b). *See* 49 Fed. Reg. 47,391 (Dec. 4, 1984).

[8]The EPA may issue an order imposing a civil penalty or commence a civil action for a violation of a hazardous waste management requirement of an authorized state, *see supra* note 7, if the Agency gives prior notice to the authorized state. *See* RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2).

(when the unit ceased operating). BWX's findings were based initially on testing in 1989 and 1990 of radioactivity in sludge from its wastewater treatment plant. BWX then informed the Region that the Cold Pond contained mixed radioactive and hazardous waste rather than hazardous waste, and was thus exempt from RCRA regulation and subject to the exclusive jurisdiction of the NRC, citing a 1988 Federal Register notice that it claimed applied to the Cold Pond.

In order to evaluate BWX's claim of enriched uranium contamination, the Agency dispatched an investigative team from EPA's National Enforcement Investigation Center ("NEIC") to the facility. The NEIC investigated the facility on October 17, 1990, and October 30, through November 1, 1990. The NEIC determined that the information provided by BWX failed to support its claim that the Cold Pond was contaminated with enriched uranium during its entire period of operation from November 1980 to September 1983.

On April 5, 1991, BWX filed a motion to dismiss the Region's complaint, invoking a 1986 EPA Federal Register notice as holding that authorized state programs, such as the VHWR, did not apply to "radioactive mixed wastes"[9] during the relevant time frame, and that mixed waste facilities in authorized states were not subject to RCRA Subtitle C Regulations prior to July 3, 1986. *See* 51 Fed. Reg. 24,504 (July 3, 1986). Thus, BWX contended that the VHWR and Subtitle C Regulations had no application to the Cold Pond during its entire period of operation.

On May 22, 1991, the Region filed a response to BWX's motion to dismiss and, by motion, sought an accelerated decision on liability. Both parties attached affidavits to their respective motions for dismissal and accelerated decision. BWX and the Region followed with replies

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[9]In a 1988 Federal Register notice, the Agency defined "radioactive mixed waste" as "any matrix containing a RCRA hazardous waste * * * and a radioactive waste subject to the Atomic Energy Act * * * ." 53 Fed. Reg. 37,046 (Sept. 23, 1988).

(containing supplemental affidavits) on June 21, 1991 (BWX), and July 24, 1991 (Region).

In support of its motion for accelerated decision on BWX's liability under RCRA and the VHWR, the Region, inter alia , asserted that (1) it had established, and BWX conceded, that the pickling acid solution in the Cold Pond was a hazardous waste regulated by RCRA; (2) BWX in defense could not show by a preponderance of the evidence that the Cold Pond was continuously contaminated with enriched uranium during its relevant period of operation from November 19, 1980, to September 30, 1983; and (3) even if the Cold Pond contained mixed radioactive and hazardous wastes, the hazardous waste in the Pond was nevertheless subject to RCRA and VHWR jurisdiction during this time period.

By an amended order and decision dated September 29, 1997, the Presiding Officer denied BWX's motion to dismiss and granted the Region's motion for an accelerated decision on liability. In reaching her decision, the Presiding Officer only considered the first two of the Region's three contentions, adopting for the sake of argument BWX's assertion that a showing of enriched uranium in the Cold Pond would remove it from RCRA jurisdiction. The Presiding Officer ruled that BWX had failed to establish that the presence of enriched uranium contamination of the Cold Pond was a "material fact" and consequently dismissed BWX's motion and granted the Region's cross-motion for an accelerated decision. In addition, the Presiding Officer stated that even if the Cold Pond were contaminated, the contamination was de minimis and "did not rise to the level contemplated by RCRA and regulations promulgated pursuant thereto." Order Denying Motion to Dismiss and Granting Motion for Accelerated Decision at 5-6. She also held that allowing the "basically non-existent" amount of enriched uranium contamination at issue, even if assumed to exist, to defeat RCRA jurisdiction would undermine the purpose of "remedial statutes such as RCRA [which are] designed to protect public health and the environment *** [and] can not be lightly set aside or found inapplicable on the basis of speculative inference alone." *Id.*

In its appeal filed November 11, 1997, BWX seeks reversal of the initial decision, asserting that "overwhelming evidence" of the Cold Pond's continuous contamination from November 19, 1980, to September 30, 1983:

> (1) requires dismissal of the Region's complaint because BWX's evidence rebuts the Region's argument that the Cold Pond was not continuously contaminated with enriched uranium, thus defeating the Region's *prima facie* case for RCRA liability; or alternatively
>
> (2) raises a "genuine issue of material fact," barring an accelerated decision in the Region's favor and requiring an evidentiary hearing on the matter.

*See* Appeal Brief at 13, 17.

In addition, BWX contends that even if the Region prevails on its motion for an accelerated decision, the Region should nevertheless be equitably estopped from enforcing its complaint. *See* Appeal Brief at 17 n.9.

## **III.** *DISCUSSION*

### **A.** *The Presiding Officer's Decision*

In reviewing the Presiding Officer's decision on the parties' cross-motions to dismiss and for an accelerated decision, we are immediately struck by its relative brevity, the summary handling of dispositive legal conclusions, and the overall lack of articulated analysis. The deliberation that no doubt underlies the decision is, as a consequence, largely hidden from view. After reviewing the record and the parties' arguments we have not been able to bridge the void left by this initial impression. More specifically, the decision is deficient in the following general respects:

(1) Due to the brevity of the analysis in the Presiding Officer's decision regarding the evidence and inferences, as well as the absence of detailed findings, it is unclear whether the Presiding Officer adhered to fundamental summary judgment principles. Thus, for example, we are uncertain whether the Presiding Officer strayed from simply determining whether disputed issues of fact existed or whether she went on to decide any such disputes.[10] Similarly, it is unclear whether the Respondent, as the nonmoving party relative to the Region's motion, was given the benefit of any presumptions to which it was entitled, such as factual allegations of the nonmoving party being taken as true for purposes of the motion. A more structured and separate analysis of each party's motion might have eliminated any ambiguities in this respect.[11]

(2) The decision appears to ignore the possibility of facts being proven by circumstantial evidence. While the Presiding Officer is correct in pointing to the absence of direct proof of the presence of enriched uranium in the Cold Pond during the three-year period, evidence exists regarding the facility and its operations in the post-1983 era such that one might reasonably infer facts regarding the facility and its operations

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[10]We recognize that in some instances, as when a court rules on cross-motions for summary determination at a bench trial, the facts may get fully developed, such that the court may proceed to actually decide the factual issues if the record is clear that no remaining facts need to be developed. 10A Wright et al., *Federal Practice & Procedure*, § 2720 (1998); *see also* William W. Schwarzer et al., *A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 474-76 (1992). In the present instance, however, it is unclear whether there is a foundation for assuming the Presiding Officer was proceeding in this manner when she ruled on the parties' motions. The lack of clarity is due in large measure to the brevity of the discussion of the evidence and associated inferences. Respondent, as noted earlier, believes that a trial is appropriate, thereby suggesting that Respondent contemplates presenting additional evidence. Further inquiry into the legitimacy of this suggestion might be appropriate on remand.

[11]Cross-motions should be considered separately since each party, as a movant for summary judgment, bears the burden of establishing that no genuine issue of material fact exists. 10A Wright et al., *Federal Practice & Procedure*, § 2720 (1998).

during the 1980-1983 period, possibly including the presence or absence of enriched uranium in the Cold Pond. Absent a detailed discussion by the Presiding Officer of that evidence, and of the parties' inferences drawn from that evidence, it is unclear to us whether any of the various inferences propounded by Respondent respecting alleged contamination of the Cold Pond are indeed unreasonable, as the Presiding Officer's decision would otherwise have us believe. Detailed findings respecting the evidence and the reasonableness of any inferences drawn from the evidence would have aided our understanding of the basis for the Presiding Officer's decision.

(3) The Presiding Officer's legal conclusions respecting (i) "de minimis" contamination as it relates to jurisdictional matters and (ii) disallowance of inferences of fact if they would in some manner (unspecified) defeat the purposes of a remedial statute, such as RCRA, are unsupported by any meaningful discussion or reference to controlling authority. Further exposition of the basis for these dispositive legal conclusions was needed before employing them as a basis for ruling on the parties' motions.

Because of these general deficiencies in the Presiding Officer's decision, we are reversing the Presiding Officer's decision in part and remanding the case for further proceedings, albeit reluctantly given the passage of time this case has been pending before the Agency.

The remaining discussion concentrates mainly on our analysis of the parties' respective burdens in proceedings for summary disposition of the case, with emphasis on the how those burdens relate to the specific issues raised by this case.

**B.** *The Factual Issue*

The factual issue addressed in the parties' motions concerns whether or not the Cold Pond was continuously contaminated with enriched uranium during the entirety of the three-year span of time specified in the complaint. BWX stored various types of liquid waste

matter in the Cold Pond for several years before draining it of all of its contents and shutting it down. As charged in the complaint, the relevant period of operation spans a three-year period from November 19, 1980 (when the Cold Pond first became subject to RCRA hazardous waste regulations for treatment storage and disposal facilities)[12] to September 30, 1983 (when the Cold Pond was retired from service). The major point of contention between the parties concerns the exact nature of the waste in the Pond. Was the waste simply ordinary hazardous waste or was it a "mixed radioactive waste" that also contained enriched uranium, a so-called "special nuclear material"? The more prosaic of the two types of waste is regulated by EPA, whereas the special version invokes the jurisdiction of the NRC. According to BWX, the NRC has exclusive jurisdiction over the Cold Pond's waste whenever special waste is mixed with ordinary hazardous waste, thus barring EPA from maintaining this enforcement proceeding. The Region disagrees, arguing that EPA has jurisdiction over the facility regardless of the presence or absence of mixed radioactive waste.

Because the waste in the Cold Pond was no longer in existence when the Region filed the complaint against BWX in 1987, it was not possible for the parties to resolve the factual issue by means of taking actual samples of the waste. Instead, the parties have had to resort to various indirect means of establishing the physical and chemical features of the Cold Pond's contents during the relevant three-year period of operation. This state of the evidence, in turn, has given rise to a derivative point of contention between the parties, namely, who has the burden of proving what was really in the Cold Pond and for what length of time? The Region contends that it has proven a violation by establishing that the Cold Pond contained ordinary hazardous waste at

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[12] Pursuant to section 3005(e) of RCRA, 42 U.S.C. § 6925(e), on November 19, 1980, all hazardous waste facilities then treating, storing, or disposing of hazardous waste became subject to requirements to notify the Agency of their hazardous waste activities and submit a Part A application to obtain interim status and continue operations. *See supra* note 5.

any time throughout the relevant three-year period of storage, whereas BWX argues that such proof alone is insufficient, for the Region must also prove that the Cold Pond was not continuously contaminated with mixed radioactive waste during that time span. Each side presented affidavits in support of its version of the facts. Significantly, in terms of narrowing the issues, both agree that if at any time during the three-year period the Cold Pond contained only ordinary hazardous waste, rather than the special waste contaminated with enriched uranium, then the Cold Pond is subject to EPA's jurisdiction under RCRA.[13]

We turn briefly for context to the regulatory status of mixed radioactive waste.

### C. *Regulatory Status of Mixed Radioactive Wastes*

The parties' dispute over the alleged contamination of hazardous waste with radioactive material arises from the regulatory status under RCRA of hazardous wastes occurring in "radioactive mixed wastes" -- wastes containing a mixture of hazardous and radioactive wastes -- and the Agency's attempt to clarify this status through publication of notices in 1986 and 1988. Taken alone, each component of the mixture allegedly involved in this proceeding presents no problem of jurisdiction: as BWX concedes in its pleadings, RCRA applies to the pickling acid waste because this solid waste exhibits the characteristic of corrosivity as defined at 40 C.F.R. § 261.22. Just as clearly, since RCRA, as a threshold matter, only applies to "solid wastes," the enriched uranium that BWX alleges contaminated the Cold Pond is exempt from RCRA, since the statute excludes from the definition of solid waste "source, special

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[13] In *U.S. v. Conservation Chemical Co. of Illinois*, 733 F. Supp. 1215 (N.D. Ind. 1989), invoked by the Region to frame the pivotal question of this decision, the court found that a storage facility used to store a characteristic hazardous waste was a "land disposal facility" subject to RCRA regulations on permitting and closure even if its contents exhibited the hazardous characteristic on only one occasion. *Conservation Chemical*, 733 F. Supp. at 1225.

nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended."[14] RCRA § 1004(27), 42 U.S.C. § 6903(27).

In order to resolve this regulatory ambiguity, the Agency issued a notice in 1986 announcing that states, in order to obtain and maintain authorization to administer and enforce a hazardous waste program pursuant to Subtitle C of RCRA, would have to demonstrate the "authority" to regulate the hazardous component of radioactive mixed wastes within one year of the publication of the notice. 51 Fed. Reg. 24,504 (July 3, 1986). However, at this time, the Agency, citing the prevailing regulatory uncertainty about this waste type, took the position that currently authorized State programs "[did] not apply to radioactive mixed waste." *Id*. In a clarification published two years later, the Agency stated that facilities "treating, storing, or disposing of radioactive mixed waste but not other hazardous waste in a State with base program authorization are not subject to RCRA regulation until the State program is revised and authorized to issue RCRA permits for radioactive mixed waste." 53 Fed. Reg. 37,045, 37,047 (Sept. 23, 1988).

Citing as support the 1986 and 1988 Agency notices, BWX contends that the alleged radioactive mixed waste in the Cold Pond was not subject to the VHWR (Virginia's authorized RCRA program), since at the time of these notices, the State had not yet received authorization to issue RCRA permits for this waste type. As the Presiding Officer did in her initial decision, we will accept for the sake of argument BWX's contention that if the Cold Pond were continuously contaminated with enriched uranium during the relevant period of operation, it would fall outside RCRA jurisdiction and instead be subject to the exclusive jurisdiction of the NRC. Amended Order at 2. Although the Region apparently contends that the hazardous waste in the Cold Pond remained subject to RCRA jurisdiction regardless of mixture with enriched

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[14]The Atomic Energy Act defines "special nuclear material," in relevant part, as "plutonium, uranium enriched in the isotope 233 or in the isotope 235 * * * ." 42 U.S.C. § 2014(aa).

uranium, this question has not been fully briefed on appeal. The Region asserts, "it is not necessary to reach [the issue]" for purposes of deciding these motions. Region's Reply at 10. The two parties thus identify the alleged continuous contamination of the Cold Pond as the material issue on which the outcome of their motions depends.

### ***D.*** *Parties' Respective Burdens of Proof on Alleged Continuous Contamination of Cold Pond with Enriched Uranium*

As a threshold matter, deciding which party bears the burden of persuasion on the issue of continuous contamination of the Cold Pond at an evidentiary hearing will clarify how we must evaluate the parties' cross-motions and the Presiding Officer's ruling on those motions. From the outset, the burden question has been a point of contention between the parties: BWX argues that the Region, as part of its prima facie case, must demonstrate that it was more likely than not that the Cold Pond was not continuously contaminated with enriched uranium and that the Region's failure to so demonstrate warrants dismissal of its complaint;[15] in contrast, the Region maintains that it has no such obligation because the issue of continuous contamination is a matter being raised by BWX as an affirmative defense for which it should bear the burden of production and persuasion.

The Consolidated Rules of Practice (the "CROP"), 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40176 (July 23, 1999), clearly assign the burdens of production (or presentation) and persuasion to the Agency on its *prima facie* case. The CROP also clearly imposes these same burdens on a Respondent as to any affirmative defenses it may

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[15]The Consolidated Rules of Practice ("the CROP"), 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40176 (July 23, 1999), provide in relevant part that "the Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20.

raise.[16] Applied to the facts of this case, if the question of the Cold Pond's continuous contamination is part of the Region's *prima facie* case, then the Region must disprove the contamination by a preponderance of the evidence; if on the other hand, it is an affirmative defense outside the parameters of the Region's *prima facie* case, then BWX must present its affirmative defense and demonstrate continuous contamination by a preponderance of the evidence.

BWX's argument that the presence of radioactive material in the Cold Pond defeats the RCRA jurisdiction that would otherwise clearly obtain is appropriately viewed as extraneous to the government's prima facie case. Since BWX is here seeking an exception to RCRA's wide ambit, BWX should reasonably bear the burden of demonstrating that the Cold Pond's hazardous waste was continuously mixed with "special waste" and thus, according to BWX, was outside RCRA jurisdiction. *See, e.g., U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967), which held that "[a] party that 'claims the benefits of an exception to the prohibition of a statute' carries the burden of proving that it falls within the exception." In *In re Standard Scrap Metal Co.,* 3 E.A.D. 267 (CJO 1990), the Chief Judicial Officer followed *First City Nat'l Bank* in ruling that a scrap metal company bore the burdens of production and persuasion to show that it disposed of PCBs before a specific past date (and would thus escape liability under TSCA), because the regulatory language that restricted the coverage of PCB disposal requirements before that date operated as a statutory exemption to TSCA requirements for PCB disposal. *Standard Scrap,* 3 E.A.D. at 272.

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[16] 40 C.F.R. § 22.24 states, "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses."

Accordingly, upon consideration of the foregoing, it is our conclusion that the issue of continuous contamination is being raised by BWX as an affirmative defense, and is not part of the Region's prima facie case. Therefore, BWX should have to demonstrate by a preponderance of the evidence that the Cold Pond was continuously contaminated with enriched uranium during the relevant period of operation.

### ***E.*** *The Parties' Cross-Motions for an Accelerated Decision*

Both parties' motions were supported by affidavits; therefore, the motions may be characterized as cross-motions for an accelerated decision, analogous to the practice prescribed by Rule 12(b) of the Federal Rules of Civil Procedure, which states that "[i]f, on a motion * * * to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment [as provided in Rule 56 of the Federal Rules] * * *." In the case of BWX, its motion to dismiss was transformed into a motion for an accelerated decision, whereas the Region's motion was denominated as such initially.

#### ***1.*** *Evidentiary Standard of Proof and Production for an Accelerated Decision*

As explained in the CROP:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20, as amended by 64 Fed. Reg. 40176 (July 23, 1999).

The CROP language on accelerated decisions directly tracks that on summary judgment motions found in Rule 56 of the Federal Rules of Civil Procedure,[17] and though the Federal Rules do not apply to these proceedings, we have in our previous rulings turned to Rule 56 and its copious jurisprudence for guidance. *See In re Clarksburg Casket Co.*, EPCRA Appeal No. 98-8, slip op. at 8 (EAB, July 16, 1999), 8 E.A.D. ____ (the standard for granting an accelerated decision is "similar to the summary judgment standard set forth in Rule 56"). *See also In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 788-782 (EAB 1993) (following Rule 56 to reject respondent's request for evidentiary hearing on NPDES permit denial because respondent failed to raise any genuine issues of material fact); *In re Newell Recycling Co., Inc.*, TSCA Appeal No. 97-7, slip op. at 20 n.14 (EAB, Sept. 13, 1999) (citing Rule 56 as guidance in rejecting respondent's request for evidentiary hearing on TSCA penalties).

In analyzing Rule 56, the Supreme Court has explained that to defeat an adversary's motion for summary judgment, a party must demonstrate that an issue is both "material" and "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. For purposes of the instant ruling, the dispute at hand -- whether the Cold Pond was continuously contaminated by enriched

[17] According to Rule 56 of the Federal Rules, a summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

uranium -- is the pivotal issue in the case and is thus clearly material.[18] Thus, we need only address whether the issue raised is "genuine."

Whether an issue is "genuine" hinges on whether, in the estimation of a court, a jury or other factfinder could reasonably find for the nonmoving party.[19] If the evidence viewed in the light most favorable to the nonmoving party is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Furthermore, the respective burdens of production of evidence that each party must meet on a motion for summary judgment in order to avoid an adverse decision implicate the substantive evidentiary standard of proof at trial or evidentiary hearing:

> [I]n deciding whether a genuine factual issue exists, the judge must consider whether the quantum and quality of evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof.

*Mayaguez*, 4 E.A.D. at 781 (citing *Anderson*, 477 U.S. at 252). In a civil matter, such as the case at hand, the standard of proof at trial is

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[18]Should the Presiding Officer find on remand that the Cold Pond was continuously contaminated with enriched uranium during the relevant three-year period, it would be necessary for the Presiding Officer to rule on whether the Region is correct in contending that the Cold Pond remained subject to RCRA jurisdiction regardless of such contamination.

[19]There is no jury in an administrative proceeding under 40 C.F.R. part 22. The fact-finding function is performed by the administrative law judge in a manner akin to that of a district court judge who performs the fact-finding function in a bench trial. This latter point is noteworthy because it may be possible for the judge, in appropriate circumstances, to resolve disputed issues of fact on cross-motions for summary judgment if it is clear that there is no further evidence to be developed. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978). *See supra* note 10.

proof by a preponderance of the evidence. *See* 40 C.F.R. § 22.24 ("Each matter of controversy [governed by the CROP] shall be decided by the Presiding Officer upon a preponderance of the evidence.").

Further, on summary judgment, neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence. 11 James W. Moore et al., *Moore's Federal Practice* § 56.13[1], [2] (3d ed. 1999). As Rule 56(e) states:

> [A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The movant assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion * * *."). If the movant has the burden of persuasion at trial, the movant must present evidence that is so strong and persuasive that no reasonable jury is free to disregard it, and that entitles the movant to a judgment in his favor as a matter of law. *See Edison v. Reliable Life Ins. Co.*, 664 F.2d 1130, 1131; *Nat'l State Bank v. Federal Reserve Bank*, 979 F.2d 1579, 1582 (3rd Cir. 1990).

In contrast, the summary judgment movant who does not carry the burden of persuasion on an issue at trial has the lesser burden of "showing" or "pointing out" to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue and that the movant is entitled to judgment in its favor as a matter of law. *Celotex*, 477 U.S. at 323-324 (1986). Once this showing

has been made, the burden of production shifts to the nonmovant having the burden of persuasion. The nonmovant's burden of production in these circumstances is considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears the burden of persuasion at trial. This burden of production requires the nonmovant to identify specific facts (with or without affidavits) from which a reasonable factfinder, applying the appropriate evidentiary standard (i.e., a preponderance of the evidence here), could find in its favor on each essential element of its claim. *Anderson*, 477 U.S. at 252.

As a corollary of the foregoing, parties opposing summary judgment must provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a trial or evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case. In considering whether a nonmovant has met this standard, courts are not supposed to engage in the jury function of determining credibility or weighing facts; instead, courts are to view the record in the case and submissions in the light most favorable to the nonmovant (including the nonmovant who bears the burden of persuasion on an issue), and are to believe all evidence offered by it. *See Anderson*, 477 U.S. at 255 ("evidence of nonmovant is to be believed and all justifiable inferences are to be drawn in his favor"). However, this indulgent standard of review does not require courts to find a genuine dispute and deny summary judgment where evidence is legally insufficient to support an essential element of a case or not significantly probative. *See Anderson*, 477 U.S. 242, 250 (stating that court may grant summary judgment where nonmovant's evidence is not significantly probative or is "one-sided" in favor of movant); *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (upholding summary judgment motion for defendant because the antitrust plaintiff failed to support conspiracy allegation with "significant probative evidence").

***2.*** *BWX's Motion to Dismiss*

Notwithstanding BWX's submission of affidavits in support of its motion, the specific factual considerations raised by the BWX motion

need not be addressed in assessing the merits of the motion, for the motion ultimately fails for a more fundamental legal reason, namely, the motion is predicated on an erroneous legal proposition.[20] The company contends that the Region, as part of its *prima facie* case, must establish that the Cold Pond was not continuously contaminated with enriched uranium during the relevant period of operation.[21] As demonstrated earlier, however, the continuous contamination of the Cold Pond is a matter for BWX to establish, since it is being raised by BWX as an affirmative defense. *See supra* Section III.D. Because of BWX's mistaken legal premise, we must dismiss the company's motion. *See, e.g., In re Standard Scrap Co.,* 3 E.A.D. 267 (CJO 1990) (in TSCA proceeding, overturning Presiding Officer's granting of motion to dismiss based on finding that the issue of timing of improper disposal was an affirmative defense, and thus not part of Agency's *prima facie* case). Accordingly, for the reason stated above, we are upholding the Presiding Officer's dismissal of BWX's motion. The grounds for dismissal cited by the Presiding Officer are rejected insofar as they served as a basis for dismissal of the motion.

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[20]The affidavits that BWX attached to its motion are, nonetheless, relevant to an assessment of the Region's cross-motion, and they can be considered by the Presiding Officer on remand in the context of determining whether or not to grant the Region's cross-motion for an accelerated decision.

[21]In a follow-up brief supporting its motion to dismiss, BWX stated that "[a]lthough [BWX] has the burden of presenting and going forward with its defense that the cold pond at all relevant times contained mixed waste, *in order for EPA to prevail, EPA must establish that it is more likely than not that the cold pond did not contain mixed waste at all relevant times*." [BWX's] Reply to EPA's Response to Motion to Dismiss and Motion for Accelerated Decision on Liability at 5 (emphasis added). BWX repeats this erroneous assertion in its appeal brief, stating that "[t]o prevail on its Motion to Dismiss, Respondent must show that Complainant failed to establish its prima facie case (i.e., Respondent must show that Complainant did not prove that the Cold Pond was not contaminated with enriched uranium throughout the period in question)." Appeal Brief at 18.

**3.** *Region's Motion for an Accelerated Decision*

In order for the Region to prevail on its motion for an accelerated decision on liability, the Region must show that it has established the critical elements of RCRA liability and that BWX has failed to raise a genuine issue of material fact on its affirmative defense of the Cold Pond's continuous contamination. The Region has established the basic elements of, and proven, a prima facie case of RCRA liability, for BWX concedes that pickling acid waste, a hazardous waste, was stored in the Cold Pond, and that the company did not obtain interim status or a permit before operating the unit. In addition, BWX does not dispute that it failed to fulfill any of the other requirements for owners or operators of RCRA-covered facilities -- such as providing groundwater monitoring, closure plans, and financial assurance -- as detailed in the Region's complaint. *See* Appeal Brief at 3-4; Amended Answer ¶¶ 8, 10 (admitting that the company stored pickling acid waste in the Cold Pond and did not obtain a permit); *supra* section II.B.

To prevail on its motion, the Region, as the movant for an accelerated decision, must also successfully dispose of BWX's affirmative defense. Therefore, the Region's task is to show that there is an absence of support in the record for the defense. See *Celotex Corp. v. Catrett*, 477 U.S. at 323-324. If the Region satisfies this burden, BWX, as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable factfinder could find in its favor by a preponderance of the evidence. *See In re Mayaguez*, 4 E.A.D. at 781; Fed. R. Civ. P. 56(e).

In analyzing the parties' respective burdens, the role of the Presiding Officer is not, as a general rule, to resolve disputed issues of fact. As previously discussed, the Presiding Officer must ordinarily accept the evidence submitted by BWX as true and give the company the benefit of all justifiable inferences from that evidence. *See Anderson*, 477 U.S. at 255. Since direct evidence of the Cold Pond's contamination is absent in this case, BWX relied entirely upon circumstantial evidence

consisting of facts and circumstances outside the Cold Pond, from which evidence it then inferred the unit's continuous contamination. BWX's exclusive reliance upon circumstantial evidence did not, by itself, render its case infirm, for circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, No. 98-1938, 2000 WL 204559 (4th Cir. (S.C.) Feb. 23, 2000); *see also* 1A Wigmore, *Evidence* § 26 (Tillers rev. 1983) ("There are innumerable decisions that support the thesis that circumstantial evidence can provide a compelling demonstration of the existence or non-existence of a fact in issue."). Any inference drawn from the evidence, whether the evidence is direct or circumstantial, must, however, be reasonable.[22] As noted earlier, it is unclear to what extent the Presiding Officer applied these principles in ruling against BWX.

Accordingly, on remand, the Presiding Officer must apply the principles discussed above, and determine whether BWX's inferences are reasonably probable in the context of surrounding facts and circumstances. *See Sylvia*, 48 F.3d at 818 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)) ("Whether

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[22]As a general matter, a court on summary judgment need not favor a party whose evidence is too lacking in probative value, *see Anderson*, 477 U.S. at 251, and accordingly, as *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995), notes, a court need only draw favorable inferences as to a fact at issue if such inferences are reasonably probable:

> It is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

*Sylvia*, 48 F.3d at 818 (citation omitted).

an inference [in summary judgment procedure] is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary."); *see also T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-632 (9th Cir. 1987) ("Inferences from the nonmoving party's 'specific facts' as to other material facts * * * may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law."); *In re Clarksburg Casket Co.*, EPCRA Appeal No. 98-9, slip op. at 16-19 (EAB, July 16, 1990), 8 E.A.D. ___ (affirming initial decision granting Agency's motion for an accelerated decision upon finding that favorable inferences sought by a nonmovant company concerning its chemical reporting obligations under the Emergency Planning and Community Right to Know Act were overwhelmed, and thus rendered unreasonable, by the Agency's contrary inferences pointing to the company's deficient reporting).

For the reasons stated above, we reverse the granting of the Region's motion for an accelerated decision and remand the matter to the Presiding Officer for further proceedings, as more specifically prescribed in Part IV *infra*.

**F.** *BWX's Equitable Estoppel Claim*

BWX raised an equitable estoppel claim in a brief filed with the Presiding Officer[23] but no ruling on the claim was apparently issued. BWX raises the claim in its appeal brief filed with the Board, wherein it asserts that even if it fails to prevail on the Region's motion for accelerated decision, and is thus found liable under RCRA and VHWR, it should nevertheless have an opportunity to argue at an evidentiary hearing that the Region is "estopped" from enforcing its complaint because the Region had "earlier concurred in [BWX's] conclusion that

[23]BWX Reply to EPA's Response to Motion to Dismiss and Motion for Accelerated Decision on Liability at 3 (raising affirmative defense of equitable estoppel).

the Cold Pond was not subject to regulation under RCRA." Appeal Brief at 17. Treating BWX's claim as an affirmative defense of equitable estoppel,[24] we deny the claim because even if the facts asserted by BWX are true, the company, in not alleging a essential element of equitable estoppel against a government entity, has failed to state a "genuine issue of material fact" entitling it to an evidentiary hearing on this matter. *See In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 778-782 (EAB 1993) (following Fed. R. Civ. P. 56 to review Region's denial of respondent's request for evidentiary hearing on NPDES permit denial).

Equitable estoppel is an equitable doctrine that precludes a party from asserting a right that the party would otherwise enjoy if that party takes actions upon which its adversary reasonably relies to its detriment. *See Heckler v. Community Health Services;* 467 U.S. 51, 59 (1984); *Bank v. U.S.*, 294 U.S. 120, 124-125 (1935).

BWX bases its equitable estoppel claim against the Region on the following assertions: (1) that after a meeting with Region III officials, the Region agreed with company officials that the NNFD's operations would not be subject to RCRA because they involved acid neutralization activities exempted from the statute's jurisdiction by 40 C.F.R. § 265.1; (2) that based on this understanding, the company withdrew its Part A application for interim operating status on March 26, 1981; and (3) that in an April 8, 1981 letter, the Region informed BWX that "[t]he [Part A permit] application does not demonstrate that the facility * * * is required to have a RCRA permit * * *." Appeal Brief at 4; Complaint, ¶ 8. Thus based on the foregoing, BWX suggests the Region should be estopped from enforcing RCRA and VHWR violations against the company because it detrimentally relied upon the Region's assurances that its operations were not subject to RCRA.

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[24]The Federal Rules of Civil Procedure, which we here consult for guidance, list "estoppel" as an affirmative defense. *See* Fed. R. Civ. P. 8(c).

When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden. As stated in *Heckler*, "[w]hen the Government is unable to enforce the law because of the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." 467 U.S. at 60. Thus, according to the case law, a party asserting equitable estoppel against the government not only must prove the traditional elements of estoppel -- that it reasonably relied upon its adversary's actions to its detriment -- but must also show that the government "engaged in some affirmative misconduct." *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995), *quoted in In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196 (EAB 1997).

Courts have routinely held that "mere [n]egligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government." *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). In *B.J. Carney*, we followed this principle in ruling that the Agency's delays in both notifying the respondent about its violations of pretreatment regulations under the Clean Water Act, and then taking enforcement against it for those violations, did not constitute an "affirmative misconduct" estopping it from enforcing its complaint against the respondent. *In re B.J. Carney*, 7 E.A.D. at 197-200.

We reject BWX's claim that it is entitled to an evidentiary hearing on the issue of equitable estoppel against the Region for the reason that the company's pleadings fail to set forth "*specific facts* showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). In particular, BWX's account of its interactions with the Region does not set forth any specific facts showing that the Region engaged in affirmative misconduct against the company, i.e., that it deliberately deceived the company or engaged in something more egregious than "mere inaction, delay, negligence of failure to follow agency guidelines." For example, BWX provides no documented evidence that the Region even discussed the Cold Pond during their alleged meeting and that the Region misinformed BWX about the Cold Pond's regulatory status. As

BWX admits, "there is no written documentation that complainant concurred in the determination that the Cold Pond was not subject to regulation, and that the Cold Pond did not need to be included on the RCRA Part A permit application."[25] *See* Respondent's Brief in Response to Complainant's Reply Brief at 2 n.2; Region's Reply at 12.[26] Thus, the company's limited assertions about the Region's actions do not rise to the level of specific facts on "affirmative misconduct" necessary to estop the Region's enforcement action.[27]

In sum, we conclude that BWX, by failing to proffer specific facts showing affirmative misconduct by the Region, has failed to raise a "genuine issue of material fact" on its equitable estoppel claim against the Region, and is therefore not entitled to an evidentiary hearing on the matter. Accordingly, pursuant to 40 C.F.R. § 22.20, we deny by accelerated decision BWX's equitable estoppel claim against the Region.

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[25]Significantly, BWX does not dispute the Region's contention that neither party has any record of a joint meeting to discuss the NNFD's regulatory status. Region's Reply at 12.

[26]The limited facts that are available about the Region's and BWX's interactions do not suggest an inference of affirmative misconduct by the Region. The Region's concurrence with BWX's determination that the NNFD did not require a RCRA permit took place, by the two parties' accounts, after BWX submitted to the Region a Part A application for interim status that did not identify the Cold Pond. Region's Reply at 12; Answer at 4, ¶ 22. This reasonably suggests that the Region's concurrence was prompted not by misconstrual of the applicable RCRA regulations, but rather by the incomplete or misleading information that BWX provided the Region on its activities.

[27]Because we have determined that BWX has not properly demonstrated affirmative misconduct necessary to raise a genuine issue on equitable estoppel, we need not consider whether BWX has satisfied the traditional elements of equitable estoppel by showing that it suffered a "detriment" and reasonably relied upon the Region's actions. *See Hemmen,* 51 F.3d at 892.

## **IV.** *CONCLUSION*

For the above reasons, we affirm the dismissal of BWX's motion to dismiss, reverse the grant of the Region's motion for an accelerated decision, and remand the case to the Presiding Officer for further proceedings. Upon remand, the Presiding Officer may either (i) issue a new decision granting the Region's motion for an accelerated decision, in whole or in part, on one or more of the issues raised by the parties (and, at the same time, curing the deficiencies discussed above), or (ii) in the event of a partial or complete denial of the motion, hold an evidentiary hearing to resolve alleged disputed issues. Any decision issued at the end of the proceedings on remand should include a detailed statement of findings and conclusions on all material issues as well as supporting discussion and analysis of those findings and conclusions.[28] 40 CFR § 22.27(a); *see also* 5 U.S.C. § 557(c).

Also, we deny by accelerated decision BWX's claim that the Region is equitably estopped from enforcing its complaint against BWX.[29]

So ordered.

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[28]Agency practice has long recognized and accepted the use of narrative or expository forms of decision in lieu of a separate statement of individually enumerated findings and conclusions. *See In re Notice of Intent to Suspend Registrations of Pesticide Products Containing Dibromochloropropane (DBCP)*, 1 E.A.D. 565, 587 (Adm'r 1979). The use of the expository form of decision necessarily assumes, however, that the decision is thorough in addressing the material issues, cites the evidence that was relied upon, and discusses the basis for the conclusions reached in the decision. *Id.* In other words, the decision must advise the reviewing tribunal of its basis with reasonable clarity and detail. The Presiding Officer's decision did not pass that test in this instance.

[29]Because the Board does not believe that oral argument would be of material assistance in resolving this matter, BWX's request for oral argument is denied.